

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Affidavit of Service Inside

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75-1329

To be argued by
PAUL E. WARBURGH, JR.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

DOCKET No. 75-1329

UNITED STATES OF AMERICA,

against

Appellee,

FRANCISCO ADRIANO ARMEDO-SARMIENTO and LIBARDO GILL,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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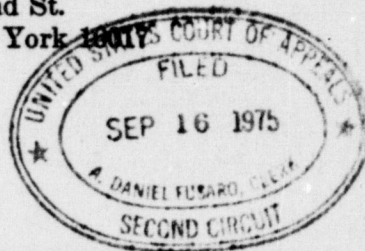


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PRELIMINARY STATEMENT

Francisco Adriano Arnedo-Sarmiento and Libardo Gill appeal from an order entered in the United States District Court for the Southern District of New York (Cannella, J.) on August 29, 1975, relieving the law firm of Kassner & Detsky from further representation of appellants. A notice of appeal from this order was filed on September 3, 1975, and on September 8, 1975, upon motion of the appellants this court granted a stay of all proceedings involving appellants until argument of the appeal scheduled for September 30, 1975.

On May 12, 1975, the government moved in the district court for an order disqualifying the law firm of Kassner & Detsky from further representation of appellants. After hearing argument the court directed that the government and appellants file memoranda supporting their positions. Memoranda were submitted on June 9, 1975, and thereafter on August 29, 1975 the district court in a memorandum decision granted the government's motion.

STATEMENT OF FACTS

In the fall of 1974, appellants Francisco Arnedo

and Libardo Gill were indicted in the United States District Court for the Southern District of New York for conspiracy to import and distribute cocaine. The docket number of the case was 74 CR 939. Around the same time an indictment was returned against Omar Hernandez a/k/a Edgar. The docket number of this case was 74 CR 494. Hernandez was arraigned on October 21, 1974, with the law firm of Kassner & Detsky, appearing as his attorney.

With reference to appellants case they were subsequently arrested and arraigned. Gill was arraigned in October, 1974 with Kassner & Detsky appearing as his attorneys and Armedo was arraigned in October, 1974 with court-assigned counsel appearing for him. Appellants case (74 CR 939) was assigned to Judge Tyler.

Thereafter the Government filed a new indictment which superseded the existing one against Omar Hernandez. In the new indictment Omar Hernandez was referred to as Edgar Restrepo. The docket number of this case was 74 CR 1128 and it was assigned to Judge Cannella. The new Restrepo indictment disclosed that Rene Rondinel, Carmen Caban, and Gloria Caban were named as unindicted

coconspirators. These three individuals were not mentioned in any way in the existing Arredo-Gill indictment. In discussions with the assistant United States attorney handling the prosecution of the Restrepo case defense counsel learned that Rene Rondinel, Carmen Caban, and Gloria Caban would be government witnesses and would give testimony directly implicating Restrepo in the crimes charged. The government was advised at that point that the firm of Kassner & Detsky had previously represented these three individuals.

Thereafter the government moved to disqualify the law firm of Kassner & Detsky from representing Edgar Restrepo and on March 21, 1975, after a short hearing the district court granted the motion. No appeal was taken from this decision.

In May, 1975, the government filed an indictment superseding both the Restrepo indictment (74 CR. 1128) and the Arredo-Gill indictment (74 CR 939). The new indictment charged all three with conspiracy to import and distribute both cocaine and marijuana. At the arraignment Kassner & Detsky appeared as counsel for Arredo and Gill

and pleas of not guilty were entered on the record. Thereafter the court set September 16, 1975, as the date for trial. On the same day that the trial date was set the government moved orally to disqualify the law firm of Kassner & Detsky as counsel for Arredo and Gill on the ground that Rene Rondinel, Carmen Caban, and Gloria Caban would now be prosecution witnesses against them thereby creating a conflict because of Kassner & Detsky's prior representation of the witnesses. The district court heard argument and directed both sides to submit memoranda of law. Arredo and Gill submitted their memorandum on June 9, 1975.

On August 29, 1975, almost three months after the case was taken under advisement, the district court in a memorandum decision disqualified Kassner & Detsky from further representation of appellants and directed appellants to retain other counsel. The court decided only the issue of a conflict between the prior representation of the witnesses and the present representation of the defendants. The court chose not to consider the other points raised by the government.

A timely notice of appeal from this decision was

then filed.

ISSUES PRESENTED

1. Is the district court's order disqualifying the defense counsel immediately before the commencement of trial appealable?
2. Does the Sixth Amendment prohibit the disqualification on conflict of interest grounds of a criminal defendant's attorney because the attorney previously represented in criminal matters individuals who will be government witnesses?

ARGUMENT

POINT I

THE DISTRICT COURT ORDER IS APPEALABLE TO THIS COURT

The district court's order even though it precedes a final judgment is appealable. United States v. Garcia, _____ F.2d _____ (CA5 August 7, 1975). The Fifth Circuit in Garcia addressed itself to an identical problem and held that a disqualification of counsel order is appealable. The court said:

"(W)e hold that the disqualification order, although not a single 'final judgment' in the traditional sense, involves a claim separable from, and collateral to, rights asserted in the

action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The court went on to say that:

"Deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize the defendants' case by prohibiting representation at trial by counsel of their choice."

It is submitted that this court should follow the Fifth Circuit and hold that the district court order is appealable.

POINT II

THE SIXTH AMENDMENT PROHIBITS DISQUALIFICATION OF A DEFENDANT'S ATTORNEY WHO HAS PREVIOUSLY REPRESENTED AN INDIVIDUAL WHO WILL BE A GOVERNMENT WITNESS AT TRIAL.

The Sixth Amendment of the United States Constitution which applies to all criminal prosecutions provides that "the accused shall enjoy the right... to have the assistance of counsel for his defense". Implicit in this amendment is the defendant's right to counsel of his choice. See: United States v. Wisniewski, 478 F.2d 274, 285 (CA2 1973). This Court has recognized that this right is one "of constitutional dimension" which "should not unnecessarily

be obstructed". United States v. Sheiner, 410 F.2d 337, 342 (CA2 1969). Included in this guarantee of assistance of counsel is the requirement that a defendant be represented by an attorney "whose undivided loyalties lie with his clients". United States v. Jeffers, _____ F.2d _____ (CA7 July 30, 1975). See also: Glasser v. United States, 315 U.S. 60, 70 (1942).

Applying these constitutional principles to the instant case reveals that the district court's holding:

"That an attorney will be disqualified from representing a criminal defendant in a case in which a former client, whom the attorney previously represented in a substantially related criminal proceeding is an important adverse witness who refuses to waive the attorney-client privilege "

was in error and also that the district court's rationale was in error. Apparently the district court's only reason for its holding was that a "former client" should never be placed in a situation where his "former lawyer" might use privileged information against him. The district court emphasized that its concern involved the "previously represented witnesses" and not the "presently represented defendants". This statement in itself demonstrates that the district court never fully grasped the mandate of the

Sixth Amendment as it applied to the issues in this case. In the context of the Sixth Amendment it is the defendant's rights that are foremost. There is no analogous amendment that pertains to the rights of witnesses.

In the few¹ courts of appeal which have considered the issues involved here all have decided that defense counsel's prior representation of a prosecution witness does not diminish counsel's effectiveness in presently representing a criminal defendant. United States v. Garcia, _____ F.2d _____ (CA5 August 7, 1975; United States v. Jeffers, _____ F.2d _____ (CA7 July 30, 1975; United States v. Donatelli, 484 F.2d 505 (CA1 1973); United States v. Alberti, 470 F.2d 878 (CA2 1972). In all of the above decisions the courts found that an attorney's previous representation of a prosecution witness did not create a conflict of interest concerning the present representation of a defendant. The court in United States v. Donatelli, supra, 507, stated:

¹Since the Sixth Amendment only applies to criminal cases decisions in civil cases which do not involve Sixth Amendment issues are inapposite.

"We are unwilling...to assume that an attorney who has severed his attorney-client relationship with a government witness retains a conflict of interest at trial."

This Court in United States v. Alberti, supra, 881, noted:

"(A)t the time of trial there was no real conflict between the interests of (the defendant) and those of (the witness)".

In United States v. Jeffers, supra, the court affirmed the lower court's view that no conflict of interest arising to constitutional proportions existed. In Jeffers because the defendant had argued that he had been prejudiced by his attorneys prior representation of a government witness, the Court also commented upon the attorneys duty to that witness not to use privileged information in cross examination.

The court stated:

"Most obviously, there might be a temptation to use the information to impeach the former client. We do not regard this risk as serious, however, for we think the courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect. United States v. Jeffers, supra, at sl.op. p. 11.

This answer to the defendant in Jeffers is also an

answer to the district court's concern in this case. The district court maligns the legal profession when it assumes that when a lawyer is faced with cross examining a former client the lawyer will inevitably breach in some way his obligation to his former client. The district court is simply indulging in speculation and then trying to raise its speculation to a place where it will be higher than a constitutional right. At issue here is a defendant's constitutional rights to free choice of counsel, not a witness's piece of mind.

To permit the district court's decision to stand would be to elevate it to a position higher than the Constitution itself. It would mean that a witness's unfounded and speculative fear that confidential matters might be used against him would be enough to deprive a criminal defendant of a right which was granted by the Bill of Rights to our Constitution almost 200 years ago.

It should be noted that originally in the fall of 1974, when appellants and other defendants were indicted there was no problem involving appellants of choice of Kassner & Detsky as their counsel. The problem arose only after the government filed a superseding indictment

combining what had once been three cases into one. The action of the government in taking what had once been a conflict-free situation and causing it to be otherwise should not be permitted to abrogate appellants right to counsel of their choice.

In any event the posture of the instant case is such that it is unlikely that the three witnesses will give any testimony which will implicate appellants. According to the overt acts in the indictment the evidence against appellants remains essentially the same as when appellants were charged in their previous indictment which did not involve in any way the three government witnesses. In considering this aspect of the case the district court rejected out of hand counsel's statements that since the witnesses would not implicate appellants there would be no need for cross examination. It is submitted that the district court's rejection is without foundation. It would border on incompetence for an attorney to cross examine a witness who did not give any testimony mentioning his client or effecting his client in any way.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted.

KASSNER & DETSKY, P.C.
Attorneys for Appellants
Francisco Adriano Armedio
Sarmiento and Libardo Gill

Paul E. Warburgh, Jr.
of Counsel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF New York } ss.:

Susan A. Unger

being duly sworn, deposes and says; that deponent
is not a party to the action, is over 18 years of age
and resides at

That on the 16th day of September 1975

deponent served the within Appellants Brief

and Joint Appendix

upon Michael Q. Carey, Ass't U.S.

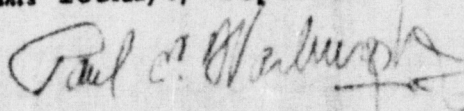
Attorney

attorney(s) for Appellee

in this action, at 1 St. Andrews Plaza
New York, New York 10007
the address designated by said attorney(s) for that
purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in - a
post office - official depository under the ex-
clusive care and custody of the United States post
office department within New York State.

Sworn to before me,

this 16th day of September 19 75


PAUL E. WarBURGH, JR.
NOTARY PUBLIC, State of New York
No. 52 - 9528430
Qualified in Suffolk County
Commission Expires March 30, 1976